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Attorney for Respondent

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Deputy Attorney General of the State of California,
Solicitors for Appellant

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. [redacted] 13

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as Bay City Hauling Co.; KENNETH C. CLARK, et al.,
Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,
Appellee.

REPLY BRIEF FOR APPELLANTS.

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[redacted] PRINTING CO., SAN FRANCISCO

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 530

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as Bay City Hauling Co.; KENNETH C. CLARK, et al.,
Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,
Appellee.

REPLY BRIEF FOR APPELLANTS.

The appellee, in his brief, refers to an additional weight fee imposed upon motor vehicles used in the transportation of property provided for by Chapter 844, Statutes of 1927, which went into effect January 1, 1929. (Page 28 of Appendix to Appellee's Brief.) He does not contend that this additional weight fee is an equivalent or an approximate equivalent for the five per cent gross receipts tax; nor could he seriously do so, as the fee ranges from a minimum of $20 per

annum to a maximum of $70 per annum, for gasoline propelled vehicles, according to weight of the vehicle, and it is not considered as a tax, but is designated as a "registration fee," nor does it apply to any trucks weighing less than 3000 pounds, unless they be propelled by electric motor. Compared to five per cent of the average annual gross earnings of a motor truck used in the transportation of property for hire, even the maximum fee of $70 would be a very small fraction of the tax.

Appellee argues in his brief that "common carriers operating for compensation over particular routes are not unlike railroads which traverse the same path between definite points, and this Court has held that railroads constitute a class whose property may be taxed differently and whose property may be taxed additionally, if the state constitution does not require equality in the matter of tax burden." California does require equality in the matter of tax burden for those *similarly situated,* as does also the federal constitution.

"All laws of a general nature shall have a uniform operation."

Constitution of California, Art. I, Sec. 11;
5 *Cal. Jur.* p. 816, Sec. 184;
Oliver Iron Mining Co. v. Lord, 262 U. S. 172;
Schlesinger v. Wisconsin, 270 U. S. 230.

Neither is the quoted analogy appropriate; for the reason that if a railroad operating the same path between definite points transported property for hire under contract with certain shippers to the exclusion of the general public, it would still be a railroad and

would be properly classified as a railroad for tax purposes. The meat of our contention that the legislation in question is discriminatory lies in the point that while common carriers transporting property for hire are subject to the tax, contract carriers for hire transporting property are not subject thereto, nor to any equivalent tax; both types of carriers use the highways to earn a livelihood in the same manner, using the same sort of vehicles, parallel each other and are in direct competition with each other and their vehicles effect the same wear and tear on the highways. So when it is contemplated that the tax in question is devoted exclusively to the maintenance and repair of the highways all of the arguments and authorities cited by appellee are not relevant or in point. In none of the cases so cited is authority found for discriminating, in a tax exclusively for highway purposes, between common carriers operating for hire between fixed termini or over regular routes and contract carriers operating for hire between like termini or routes. When it is also considered that contract carriers so operating can not be controlled as a public utility, like common carriers, the reason is doubly persuasive that such control should and could, in a measure, be exercised in the interest of preventing unfair competition with regulated common carriers by a heavy gross receipts tax, such as the tax in question. What the State of California has attempted to do in an unlawful manner, it has failed and neglected to do in a lawful manner. In other words, it attempted to impress upon contract carriers for hire, operating between fixed termini or over regular routes, the status

of common carriers, for the purpose of *regulating the business* of such contract carriers. This Court held that a classification with common carriers for such purpose, could not be effected. *(Frost v. Railroad Commission,* 271 U. S. 583.) But we submit that a like classification for the purpose of levying a tax for the *privilege of use* of the highways *as a business,* would be not only a reasonable and constitutional classification but would save the regulated common carriers from the demoralization of their business now imminent. (Bill of Complaint, paragraphs IX, X, XII; R. pp. 9-11.)

That this situation is recognized by the courts of California is evidenced by *Western Association of Short Line Railroads v. Railroad Commission,* 173 Cal. 802, quoted at page 14 of appellee's brief, a portion of which we are requoting from said brief as follows:

> "And, moreover, it is not only a matter of common knowledge, but is presented in these cases, that in many instances these unregulated companies interfere seriously with the revenues of controlled public utilities, a percentage of whose revenues goes by way of taxes to the support of the state."
>
> (See also quotations from *Frost v. Railroad Commission,* 197 Cal. 230, Appellants' Opening Brief p. 26.)

The State of Michigan likewise recognized that contract carriers and common carriers operating between fixed termini or over regular routes are similarly situated and attempted to classify the former with the latter as public utilities, but, as was said in the *Frost* case, *supra,* this Court held in *Michigan Public Util-*

ities Commission v. Duke, 266 U. S. 570, that contract carriers can not arbitrarily be impressed with the status of common carriers for such purpose. This Court intimates in the *Frost* case (271 U. S., at page 591) that a classification regulating the *use* of the public highways could have included the contract carriers operating between fixed termini or over regular routes with the common carriers so operating, but that legislation could not arbitrarily classify them for the purpose of regulating or controlling the *business* of such contract carriers, for it there states:

> "It is very clear that the act as thus applied is in no real sense a regulation of the *use* of the public highways. It is a regulation of the *business* of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of highways is not involved. This, in effect, is the view of the Court below plainly expressed."

THE APPELLANTS CAN NOT BE DEPRIVED OF A CONSTITUTIONAL RIGHT AS THE CONDITION OF ENJOYING A PRIVILEGE.

The appellee argues, and cites authority in support of the argument, that the appellants having voluntarily accepted the alleged benefits of being classified as common carriers subject to the regulation and control of the Railroad Commission can not now complain of the discrimination in taxation. Our answer is that some of these appellants were operating as common carriers between fixed termini or over regular routes before the year 1917, when the State Railroad Com-

mission was first given control of their operations; also that some of the appellants were not always operating between fixed termini or over regular routes when they were notified by the Railroad Commission that they would have to submit to its jurisdiction or be prosecuted under the Auto Stage and Truck Transportation Act. Whether a carrier operates between fixed termini or over regular routes is a question of fact to be conclusively determined by the Railroad Commission, and is not subject to review. (Sec. 1 (e), Appellee's Brief, p. 33.) Some of the appellants found themselves in a position where they were obliged, in order to retain their more profitable business, to give up some of their business not obtained over regular routes or between fixed termini, and submit to the jurisdiction of the Railroad Commission. We submit that such action was not entirely free and voluntary on the part of such appellants; furthermore, that the alleged advantages specified in page 10 of appellee's brief, namely: "power to fix their rates, fares, charges, classifications, rules and regulations, power to regulate their accounts, service and safety of operations, and, in general, power in all other matters affecting the relationship between such companies and the traveling public," because of the free and unrestricted competition of the contract carriers not subject to the severe and heavy taxation involved in this litigation, have proven a restraint, burden and restriction upon the free and equal competition of the appellants, and have been a handicap rather than a benefit to them. (See report of California State Board

of Equalization, quoted at page 28 of Appellant's Opening Brief.)

In other words, appellee contends that because appellants enjoy the privileges of a common carrier operating between fixed termini or over regular routes and the privilege of being regulated by the State Railroad Commission, the appellants should not complain if they are subjected to a discriminatory or unconstitutional tax. The language of this Court used in the *Frost* case is an extremely appropriate answer to such a situation. That answer, quoting from the text of that decision, is as follows:

> "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool, —an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which constitutes an intolerable burden.
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same results are accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guar-

anties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost v. Railroad Commission,* 271 U. S. 593-594, 70 L. Ed. 1104, 1105, (and numerous cases quoted therein in support of the text).

The appellee relies on the case of *Liberty Highway Co. v. Michigan Public Utilities Commission,* 294 Fed. 703, and quotes from the text of that decision as tending to support the reasonableness of the classification affecting common carriers engaged in the business of transporting persons or property for hire upon the public highways over fixed routes or between fixed termini. That decision rests upon Act 209 of the Public Acts of Michigan of 1923. That act provides that no person, firm or corporation shall engage or continue in the business of transporting persons or property by motor vehicle, for hire, over the public highways of the state, over fixed routes or between fixed termini, unless they shall have obtained a permit from the Michigan Public Utilities Commission.

Section 3 of said Michigan act makes all of such carriers common carriers and it therefore includes within its definition contract carriers operating between fixed termini or over regular routes, as well as common-law common carriers. In other words, it includes all of the same class within one classification for the purpose of regulating their business as public utilities. That case was decided December 15, 1923, and that act, like the Auto Stage and Truck Transportation Act of California, was later held by this Court to be unconstitutional in the case of *Michigan Public*

Utilities Commission v. Duke, supra, for the reason that it attempted by legislative fiat to convert a private or contract carrier into a common carrier. The reasoning of the *Liberty Highway Co.* case therefore supports the contention of the appellants that contract carriers and common carriers for hire, using the public highways as a business should be properly classed as one group in any measure for taxation purposes or other purposes that affect the *use* of the highways.

The appellee likewise relies upon the case of *Iowa Motor Vehicle Association v. Board of Railroad Commissioners,* 221 N. W. 364, and quotes extensively at pages 17, 18 and 19 of his brief from the text of that decision, in support of the proposition that a classification of common carriers operating between fixed termini or over regular routes is constitutional. But a reading of the statute of the State of Iowa, as quoted in the decision, indicates that the tax there applied was not limited to common carriers. The tax under that statute is a per ton mile tax and is applicable to certain motor vehicles as defined by the act there construed. Section 1 of said act provides:

> "The term 'motor vehicle' shall mean any automobile, automobile truck, motorbus, or other self-propelled vehicle, not operated upon fixed rails or tracks, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route," etc.

It will thus be seen that the tax was also made applicable to motor vehicles operating under contract between fixed termini or over regular routes, for hire. Furthermore, the Iowa Supreme Court clearly shows the basis of its decision in the following language:

> "The right of a citizen to travel upon the highway and transport his property thereon in the ordinary course of living and business is radically different from that of one who makes a certain portion of the highway his place of business and uses it for private gain in the transportation of freight or passengers as under the terms of the statute in question."
>
> *Iowa Motor Vehicle Association v. Board of Railroad Commissioners,* 221 N. W. 364, 369.

The appellants do not complain or contend that they are deprived of their property without due process of law because of the severity of the tax burden alone, but they contend that because of the discriminatory nature of the tax coupled with its severity the two elements combined permit a condition of such unfair competition by those contract carriers who are neither subject to regulation by the Railroad Commission nor to the payment of the tax, that it amounts to a flagrant and palpable inequality between the burden imposed and the benefits received as to constitute the arbitrary taking over of property without compensation, or in other words "to spoliation under the guise of exerting the power of taxing."

Dane v. Jackson, 256 U. S. 589, 599;

The Michigan Telephone Tax Cases, 185 Fed. 634, 229 U. S. 322, 335.

Bill of Complaint, p. VIII, IX, X, XI, XII, XV, R. pp. 9, 10, 11, 12.

We submit, therefore, that the decree of the lower Court denying the motion for an interlocutory injunction, granting the motion to dismiss the bill of complaint and upholding the constitutionality of Section

15, Article XIII, of the State Constitution and the enabling legislation should be reversed.

Dated, San Francisco,
April 6, 1929.

Respectfully submitted,
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Solicitors for Appellants.